THE GREY AREA

Concordia UNIVERSITY

April 1991, Vol. 1, No.2

Editor's Note

The office of the Legal Counsel appreciated the favourable comments received subsequent to the publication of our first legal bulletin. We are pleased that *The Grey Area* has proven useful to the Concordia community.

The purpose of *The Grey Area* is to provide basic information on legal issues of interest. Thus, specific legal questions should be directed to us at BC-124, local 4854.

This issue is devoted to Health and Safety. We will analyze the legal framework of this field, especially the *Occupational Health and Safety Act.* The civil liability régime which flows from the Québec *Civil Code* will also be discussed. Finally, important Court decisions related to Health and Safety will be summarized and analyzed.

In our next issue, we will be discussing Administrative and Disciplinary Law, particularly how and why the Courts intervene in university administrative and academic matters. If you have any questions related to this area which you think would be of interest to the Concordia community, please get in touch with me.

I would like to acknowledge the contribution made by Susan Magor, Co-ordinator of the Environmental Health and Safety Office, who co-wrote the Questions and Answers section of this issue. I would also like to, once again, note the layout and design skills of my Assistant Editor, Alison Kavanagh.

Michèle Gamache
Legal Counsel

In this issue... Health and Safety

An analysis of the laws which apply to the health and safety field 2
Questions and answers on health and safety 3
Legal impact of a statutory obligation 4
Safety obligation of an educational institution 4
Constitutionality of a strict liability provision 5
Powers of a CSST inspector 5
General principles with respect to civil liability 7

In order to understand Health and Safety Law, it is important to know which laws regulate this field.

Occupational Health and Safety Act

This Act aims at eliminating at the source all dangers to the health, safety and physical well-being of workers. To this end, it elaborates employer-employee rights and obligations and establishes mechanisms to ensure employees' participation in decisions affecting their health and safety.

Although it was adopted in 1979, the law has been applied gradually to economic sectors. By the end of the year, educational institutions will be required to conform fully to the Act. This means that the University will need to develop a comprehensive prevention programme, set up additional safety committees and support the appointment of safety representatives.

Regulations Respecting Information on Hazardous Materials. Adopted under the above mentioned Act, these regulations impose on an employer certain obligations, such as the implementation of a proper labelling system for hazardous materials and training and information programmes.

Regulations Respecting Industrial and Commercial Establishments. Adopted under the repealed *Industrial and Commercial Establishments Act*, these regulations are now part of the regulations adopted under the *Occupational Health and Safety Act.*

Their main application to educational institutions concerns the safety of machinery and equipment used by employees and students, especially wood-working machinery and metal-working machinery.

Regulations Respecting the Quality of the Work Environment. The purpose of these regulations is to ensure the quality of the work environment and to safeguard the health of workers. Quality of the air, ventilation, heating, heat stress, lighting, noise, sanitary standards and concentration of gases, dusts, fumes, vapours or mists in a work environment are all matters governed by these regulations.

Industrial Accidents and Occupational Diseases Act

This Act establishes a mandatory compensation system that benefits workers who may suffer employment injuries or occupational diseases. It covers all staff and faculty, both full- and part-time, graduate students working as teaching assistants or laboratory demonstrators and students who are undergoing a training period in the course of their studies at the University. Volunteer workers are also covered.

The Act regulates all aspects of workers' compensation: salary replacement, medical rehabilitative services, job security, survivor benefits and protective assignments. The workers' compensation system is administered by the *Commission de la santé et de la sécurité du travail* (CSST) and financed through employers' contributions.

Public Buildings Safety Act

Adopted in 1964, this Act imposes safety obligations on owners and occupiers of public buildings. Although some may argue that universities are not specifically included by the concepts of "schools" or "colleges" defined as public buildings by the Act, this Act states that it applies to certain two- or more storied buildings, indoor and outdoor places of assembly, libraries, business offices and public pools.

Regulations Respecting Safety in Public Buildings. These regulations deal with all aspects of physical safety of a building: maintenance, emergency exits, fire resistance, fire protection, emergency lighting, ventilation, elevators, stairs, heating apparatus, construction and operation of stages, theatres and public pools.

Civil Code

The Québec *Civil Code* expresses general principles of legal liability in Québec law. It states the essential conditions for the existence of legal liability and establishes certain presumptions of fault such as the one imposed on an employer for damage caused by its employees.

Hazardous Materials Information Review Act

Health and safety are under provincial jurisdiction. However, the Parliament of Canada is competent to regulate hazardous materials because the importation and the extra-provincial commerce of these materials are within federal jurisdiction. Thus, in order to protect workers, the Act imposes certain obligations on suppliers who sell or import a controlled product for use in a workplace in Canada.

Regulations Respecting Controlled Products. A product which meets any of the criteria established by these regulations is a controlled product subject to these regulations.

Review Regulations Respecting Hazardous Materials. These regulations impose obligations related to the disclosure of the identity and concentration of certain ingredients found in a controlled product.

What is the Commission de la santé et de la sécurité du travail (CSST)?

The CSST is a corporation within the meaning of the *Civil Code* which has, in addition to the general powers of such a corporation, special powers conferred upon it by the Act. This corporation is independent from the Québec government. Its function is to prepare, propose and implement policies relating to worker health and safety to ensure a safer work environment.

It is mandated to establish priorities for intervention, to carry out inspections, apply sanctions, administer the workers' compensation system, provide education and promote research.

Q: How does the Occupational Health & Safety Act apply to the University?

A: Pursuant to the *Occupational Health and Safety Act*, an employer must take the necessary measures to protect the health, safety and physical well-being of employees. In particular, the employer must:

- see that the establishments under its authority are equipped so that the organization of work, working conditions and procedures are laid out and organized in a manner which ensures the protection of employees;
- identify, control and eliminate contaminants;
- provide supervision, training, assistance and sufficient information regarding risks to ensure that an employee possesses the skill and knowledge to safely perform the work assigned;
- establish an independent Health and Safety Committee to oversee and ensure the proper application of the Act in the workplace; and
- designate additional personnel to be responsible for health and safety matters and to co-operate and co-ordinate with these designated individuals, the health and safety committee and any other person responsible for the application of the Act and its regulations.

In addition to the employer's obligation to provide a safe workplace, information, training and supervision, employees are given other important rights:

- the right to refuse to perform work which they reasonably believe will or could expose themselves or others to danger; and
- preventative and curative health services and protective reassignment.

Employees are obliged to co-operate with the employer and designated safety representatives to identify, control and eliminate health hazards and to take whatever measures may be necessary to protect themselves.

Q: Do academics and administrators have added responsibilities?

A: We cannot say that the obligations imposed on an employer by this Act are more important than those imposed on a worker. However, an employer acts through its administrative units and officers. Consequently, the Rector, Vice-Rectors, Deans, Chairs, some faculty members or other persons in positions of authority shall fulfill, on behalf of the University, its obligations.

Q: What are the responsibilities of a supervisor? Who is considered to be a supervisor?

A: The above-mentioned Act gives us some indications concerning what the term "supervisor" covers, while its definition of a worker excludes supervisors, managers or persons acting as representatives of an employer. In our institution, directors, co-ordinators, administrators, whether academic or not, or technical supervisors may consider themselves as managers or representatives of the University.

In these capacities, they shall fulfill the obligations imposed on the University. As for their specific duties, they are laid out in the policy entitled *Health and Safety Programme Responsibilities at the Operational Level* (SA-9).

Q: If a supervisor does not comply with the Act and its regulations, can he or she be fined?

A: *Under the Occupational Health and Safety Act,* any moral or physical person (e.g., corporate body or individual) may be sued if this person contravenes its prescriptions or regulations, a decision or order rendered under the Act, or induces a person to not comply with it. The fines which may be imposed on an individual vary from $200 to $500. In the case of a subsequent offence, a fine of $1,000 may be imposed. As for a corporation, fines of $500 to $1,000 may be imposed and, in the case of a subsequent offence, a fine of $2,000.

If an individual is found guilty of having compromised directly and seriously the health, safety and physical integrity of a worker, he or she may also be sentenced to imprisonment from a minimum of two months to a maximum of six months. In case of a subsequent offence, a sentence of up to one year may be imposed. If a corporation is found guilty of the same offence, a fine of at least $5,000 may be imposed and, in the case of a subsequent offence, a fine of $50,000.

The Act expressly states that when a corporation has committed an infraction, any administrator, director, officer, employee or representative of this corporation who has prescribed, authorized or consented to the committing of this infraction is presumed to have participated in its commission and, therefore, may be individually sued regardless of whether the corporation has been sued, or found guilty or not.

Q: Who can file a suit under the Act?

A: The *Commission de la santé et sécurité du travail* (CSST), an accredited association, such as a union, or any concerned person may file a suit.

Q: Could a supervisor be held responsible for an employee who does not comply with the Act and its regulations?

A: A supervisor is not responsible (in the legal sense of the term) for a fault committed by an employee who has disregarded safety regulations or internal policies. However, the supervisor should impose a disciplinary measure on the employee or, at least, give a warning.

Q: How does this Act affect individuals working and studying in the University?

A: To enable itself to discharge its legal obligations, the University has assigned responsibility for occupational health and safety to various supervisory functions within the organization.

Through its policies, the University has extended the rights recognized to employees to students as well, on the basis that it has a moral, legal and ethical obligation to provide students with at least as much protection as is given to employees and to pay even greater attention to supervision and training.

Q: Where can I get more information?

A: The University has established an Environmental Health and Safety Office. One of the primary functions of the Office is to provide advice, information and counselling in all matters relating to occupational health and safety and to assist individuals and groups in exercising their rights and discharging their responsibilities.

The above section was co-written by Susan Magor, Co-ordinator, Environmental Health and Safety, and Michèle Gamache, Legal Counsel.

Environmental Health and Safety Office

One of the University's obligations is to keep a register of all work accidents and incidents and to investigate these through supervisors, safety representatives and the Health and Safety Committee. The Environmental Health and Safety Office co-ordinates this function, both within the University through an internal reporting system, and with the CSST in accordance with the regulations adopted under the *Occupational Health and Safety Act*. It also provides advice and assistance to groups and individuals in the exercise of their rights and responsibilities.

CASE LAW

Legal impact of a statutory obligation.

In the case *Morin v. Blais*, the Supreme Court of Canada had to determine the liability of the litigants as a result of a traffic accident involving the application of some provisions of a provincial *Highway Code*.

For the majority of the Court, Beetz, J., stated the view that these provisions laid down elementary standards of care. In his opinion, if the breach of regulations is immediately followed by an accident, which the standard was "...expressly designed to prevent, it is reasonable to presume that there is a causal link between the fault and the accident, unless there is a demonstration or a strong indication to the contrary."

As discussed previously, a damage and a causal link between the latter and a fault must exist to give rise to civil liability. Nevertheless, the contents of a statutory obligation would serve to establish this causal link because it is deemed to express minimum standards of care.

(Case discussed: *Morin v. Blais*, [1975] S.C.R. 570.)

Safety obligation of an educational institution.

In the case *Collège d'enseignement général et professionnel de Sherbrooke v. Soucie,* the Québec Court of Appeal ruled that the *Regulations Respecting Industrial and Commercial Establishments* apply to educational institutions and, therefore, benefit students.

Upholding the decision of the Superior Court, the Court of Appeal ruled that a CÉGÈP woodshop was subject to these regulations.

Adopted under the repealed *Industrial and Commercial Establishments Act,* these regulations are now part of the regulations adopted under the *Occupational Health and Safety Act.*

What is worth noting in this case is that the violation of these regulations, which govern the maintenance, operation and safety of equipment and machinery in a workplace, has given rise to the liability of an educational institution for damage suffered by a student.

The CÉGÈP, along with the instructor, were held liable for allowing a student in a carpentry class to use a circular saw without a protector.

However, the student whose fingers were cut was held to be partially liable for having committed a fault in keeping his hands too close to the blade and by not adjusting the blade to height as instructed.

(Case discussed: *Collège d'enseignement général et professionnel de Sherbrooke v. Soucie,* [1990] R.R.A. 35.)

Constitutionality of a strict liability provision.

Article 239 of the *Occupational Health and Safety Act* states that proof that an offence has been committed by an agent or mandatory of an employer or one of its workers suffices to establish that it was committed by this employer. The latter's only defence would be to establish that the offence was committed without its knowledge or consent and despite provisions made to prevent its being committed.

However, the Québec Superior Court ruled that this provision contravenes the presumption of innocence recognized and protected by the *Canadian Charter of Rights and Freedoms.*

Article 1 of the Canadian Charter states: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it, subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

In this case, the Court has reached the conclusion that the limitation of the presumption of innocence which flows from the above mentioned provision was not reasonable because there was no proportionality between the effects of the measures and the objective of the *Occupational Health and Safety Act.*

(Case discussed: *Ascenseurs Leclerc Ltée v. Commission de la santé et de la sécurité du travail* (CSST), [1988] R.J.Q. 1858.)

Powers of a CSST inspector.

The Québec Appeal Court has ruled that a CSST inspector may issue a remedial order requiring correctives which go beyond the prescriptions of the *Occupational Health and Safety Act* and its regulations.

The Court has stated that this Act was one involving public order and, therefore, should be interpreted liberally. Furthermore, in its opinion, the role of an inspector is not limited to verifying if an employer complies with the law and its regulations. If the law is silent on a specific issue, an inspector may issue a remedial order to ensure that the health and safety of workers are protected.

(Case discussed: *Domtar Inc. v. Commission d'appel en matière de lésions professionnelles* (CALP), Québec A.C. 200-09-00298-982, July 28, 1990, by Morin, J. and Rousseau-Houle, J.)

Concept of Fault

According to J.V.V. Nicholls, the concept of fault could be defined as a "mode of behaviour that is contrary to an express provision of the law or that fails to measure up to the standards of care required by the Courts in similar circumstances."

GENERAL PRINCIPLES WITH RESPECT TO...

Civil Liability

Civil liability of a person. Article 1053 of the *Civil Code* states that "Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, neglect or want of skill." Thus, the essential conditions for the existence of civil liability are the capacity of a person to discern right from wrong, a fault, a damage and a causal link between a fault and a damage.

With respect to the first condition, it should be pointed out that in civil law there is no distinction between a moral and a physical person (e.g., corporate body or individual). Therefore, a corporation may be held liable for damage caused by its administrative units, acting beyond the scope of their functions.

Civil liability of an employer for damage caused by an employee. Article 1054, paragraph 7, of the *Civil Code* states: "Masters and employers are responsible for the damage caused by their servants and workmen in the performance of the work for which they are employed." Thus, an employer may be held liable for damage caused by one of its employees in the performance of the work for which he or she is employed, or any person who is in a "master-servant" relationship. Mere disobedience, negligence or abuse of functions do not exonerate an employer from responsibility. To do so, such acts must have occurred outside the normal scope of the employee's duties.

Employer's defence system. Québec Courts have decided that there is a "non-rebuttable presumption" in Article 1054, paragraph 7, of the *Civil Code*. The only defence of an employer would consist of establishing that the person has not committed a fault or that the fault has been committed outside the scope of the performance of the employee's duties, or that the damage resulted from the victim's fault, or from a third party's fault, or that the damage has been caused by a fortuitous event or an "act of God" or *force majeure.*

University's liability insurance. The University protects itself and its employees from civil liability through liability insurance. Nevertheless, this insurance does not cover a faulty act that has been performed outside the normal scope of the performance of an employee's duties, or in the event that he or she has acted with gross neglect or maliciously.

Liability régime under the Industrial Accidents and Occupational Diseases Act. This Act provides for a mandatory compensation system to pay damages or benefits to workers who suffer employment injuries or occupational diseases. It replaces the usual liability system based on the fault of the employer.

A worker suffering an employment injury could not initiate a civil liability action against his or her employer because of this injury, nor could the beneficiary of the worker by reason of the latter's death. Exceptionally, the beneficiary or a worker could sue an employer other than the employer of the injured worker if this employer had committed a fault that would constitute an offence or indictable offence under the *Criminal Code*, such as criminal negligence, or to recover the amount by which the loss sustained would exceed the benefit received.

Finally, a worker or his or her beneficiary may not bring a civil liability action against a worker or a mandatory of an employer for a fault committed in the performance of his or her duties, except in the case where a health professional would be responsible for an employment injury.

Did you know that...

A medical examination, in some circumstances, does not constitute an infringement to the right to inviolability of the person protected by the *Quebec Charter of Rights and Freedoms*. Indeed, a pre-employment medical examination may be requested by an employer after the selection of a candidate if he or she has already received a formal offer of employment, conditional on the result of the medical examination.

An employer may also request that an employee undergo a medical examination in cases where the employee's functions involve risks to his or her health. An employee who is absent from work and does not submit a medical certificate when required by the employer may also be subjected to a medical examination. Finally, when an employer has reasonable grounds to believe that an employee is incapable of fulfilling his or her functions or that the employee constitutes a threat towards other employees or the property of the employer, the latter may request that the employee be examined.

Health and Safety Committee

Pursuant to the *Occupational Health and Safety Act*, the University's Health and Safety Committee shall ensure that employees participate in decisions affecting their health and safety while at work.

The Act empowers the committee to review reports of accidents, carry out inspections and investigations, select personal protective equipment, determine educational requirements, receive complaints, review and comment on the prevention programme prepared by the employer, choose the occupational health physician and approve the health programme.

The committee, established in 1983, reports to the Vice-Rector, Services. Any member of the University may attend its meetings. Its minutes and correspondence are available for examination at the Environmental Health and Safety Office, SGW, D-304.

An educational institution would not be held liable for the damage caused by one of its adult students. Article 1054, paragraph 5, of the *Civil Code* states that schoolmasters are responsible for the damage caused by their pupils. However, according to the jurisprudence, a student's minority (i.e., being under the age of 18) is one of the conditions that may give rise to the liability of a schoolmaster. However, that does not exclude the fact that an educational institution would be held partially liable for damage caused by a student if the institution or one of its employees has contributed by a faulty act, whether by commission or omission, to the damage.

(Case discussed: *Roeszler v. Royal Institution for the Advancement of Learning*, [1959] C.S. 628.)

University's Contributions related to Health and Safety. For the year 1990, Concordia was charged by the CSST at a rate of 48 cents for every $100 of mass salary for workers' compensation insurance. This rate, one of the lowest of any Quebec university, is partially due to our past record in accident prevention. Although part of this rate is fixed and spread uniformly over the educational sector, a portion is assessed on the basis of past performance, being the actual cost of compensation claims at the University over the past three years.

Apart from our moral, legal and ethical obligations to prevent accidents, there are other important financial incentives. The real cost of accidents is high and difficult to track because most of the cost is indirect and hidden. Experts estimate that the ration of indirect to direct costs is about 4 to 1.

NEXT ISSUE:

Administrative and Disciplinary Law

If you have any particular questions regarding Administrative and Disciplinary Law, please send them to us at the Legal Counsel Office.

Editor: Michèle Gamache
Editorial Assistant: A. Kavanagh
Research Assistant: B. Freedman
Printing: Concordia Printing Services
Logo Design: M. Hainsworth, Marketing-Communications

Published by:
THE LEGAL COUNSEL OFFICE
Mailing Address:
1455 de Maisonneuve West, BC 124
Montréal, Québec H8R 1M8
Location: 1463 Bishop St.
Telephone: (514) 848-4854
Fax Number: (514) 848-8765

This Bulletin has been prepared for purposes of general information only. It must in no case be considered as a comprehensive study of the law nor an expression of opinion upon the matters reviewed in it. It would be advisable to consult with the Legal Counsel on any question concerning one's individual circumstances.